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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 558

MAGNOLIA PETROLEUM COMPANY, THE OHIO OIL COMPANY, THE SUPERIOR OIL COMPANY AND WESLEY WEST, *Petitioners*

v.

FEDERAL POWER COMMISSION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, by their respective attorneys, pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Fifth Circuit dismissing, for lack of jurisdiction, petitioners' respective petitions for review of Federal Power Commission Order No. 174-A.

The cases of these several petitioners involve identical and closely related questions which merit review by this Court. This single petition is presented pursuant to Rule 23(5) of the Rules of this Court.

OPINION AND ORDER BELOW

The opinion and dissenting opinion of the court of appeals (R. 485, 503; App. A, 1, 16)[1] are reported at 236 F. 2d 785 and 793. Order No. 174-A of the Federal Power Commission and the dissenting views of Commissioner Digby (R. 112-116; App. A, 79-96) are published at 19 F.R. 5081.

JURISDICTION

The judgments of the court of appeals (R. 545, 595, 682, 771; App. A, 51-52) were entered on June 30, 1956. Petitions for rehearing were denied on August 21, 1956 (R. 574, 605, 688, 778; App. A, 53-54). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an order issued by the Federal Power Commission, without notice or hearing, purporting to promulgate regulations applicable to an identifiable class of persons, is reviewable under Section 19(b) of the Natural Gas Act or Section 10 of the Administrative Procedure Act in proceedings instituted in a court of appeals by persons belonging to the class, who allege that the order applies to them, that it exceeds the statutory authority of the Commission and its

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[1] Throughout this petition the citation "R" will refer to the Transcript of Record certified by the clerk of the court of appeals. "App." citations refer to Appendix A or Appendix B, which, because the materials are voluminous, have been printed separately, as permitted by Rule 23 (1)(i). Appendix A comprises the materials required by Rule 23(1)(i) to be appended to the petition for certiorari. Appendix B contains additional pertinent portions of the record which, as filed in this Court, is partly printed and partly typewritten.

powers of regulation, that it unlawfully interferes with and disrupts their businesses, and that it is of a substantive character and has an immediate impact upon them and their businesses.

STATUTE INVOLVED

The pertinent provisions of the Natural Gas Act of June 21, 1938, 52 Stat. 821, as amended, 15 U.S.C. 717 *et seq.*, are printed in Appendix A, presented herewith, at pages 131-140.

STATEMENT

This is a proceeding in which petitioners seek judicial review of Order No. 174-A of the Federal Power Commission (19 F.R. 5081; 18 CFR, Parts 154 and 157; R. 112-116; App. A, 79-96). That order was issued by the Commission on August 6, 1954, without notice or hearing, and took effect immediately (R. 114; App. A, 89). It superseded Order No. 174 issued on July 16, 1954, also without notice or hearing, which likewise went into effect immediately (19 F.R. 4534; R. 87-111; App. A, 59-78). Both orders were purportedly based on the decision of this Court in *Phillips Petroleum Co.* v. *Wisconsin,* 347 U.S. 672.[2] They were made applicable to a class of persons called "independent producers", who, for the first time, were subjected by such orders to the Commission's jurisdiction. Order No. 174-A, the one under attack, defined, delimited and fixed the rights and duties of independent pro-

[2] The question presented in the *Phillips* case was a narrow one, being limited to whether, under Section 5 of the Natural Gas Act, 15 U.S.C. 717d (App. A, 134), the Federal Power Commission could regulate the sales price of gas sold by Phillips at the tailgates of its gasoline plants. See 347 U.S. at 674-675.

ducers under contracts entered into before the *Phillips* decision, as well as their rights under contracts subsequently entered into.

As to existing contracts the order *inter alia* (a) rolled back all contract prices to the level of those in effect on June 7, 1954 (Sec. 154.94; R. 112-113; App. A, 81-83); (b) fixed future rates at the June 7, 1954, prices (Sec. 154.94(c); R. 112; App. A, 82); (c) determined that all subsequent periodic price increases provided for in contracts were subject to the Commission's suspension powers under Section 4(e) of the Act (Sec. 154.94(d); R. 112; App. A, 82); (d) required all oral contracts to be reduced to writing (Sec. 154.95; R. 113; App. A, 83); (e) commanded the filing, as rate schedules, of every written contract under which gas deliveries were being made on June 7, 1954 (Sec. 154.92(a); R. 112; App. A, 80-81); (f) directed the continuance of deliveries until certificates of public convenience and necessity were applied for and acted upon by the Commission (Sec. 157.23(a); R. 113; App. A, 85); (g) commanded the filing of such applications within some 60 days (*Ibid.*); and (h) prohibited the abandonment of any sale being made on June 7, 1954, without prior approval of the Commission (Sec. 157.28; R. 114; App. A, 89).

As to new contracts, the order *inter alia* (a) required such contracts to be filed as rate schedules (Sec. 154.92(b); R. 112; App. A, 81); (b) determined that all subsequent increases provided for in such contracts were subject to the Commission's suspension powers under Section 4(e) (Sec. 154.94(b) and (d); R. 112; App. A, 82); (c) required the filing of applications for certificates of public convenience and necessity before commencing deliveries (Sec. 157.23(b); R. 113;

App. A, 85-86); and (d) prohibited the abandonment of such deliveries without Commission approval (Sec. 157.28; R. 114; App. A, 89).

Petitioners are engaged in the business of producing and gathering natural gas. As an incident of this business, they sell under many different contracts portions of their production to natural gas companies who transport and resell the gas in interstate commerce, but petitioners do not own or operate interstate transportation lines or facilities. (R. 378-386; 388; 396-397; 408-409; 430-432; App. B, 143-149; 151; 162-163; 172-173; 190-191). The impact of the order upon petitioners, and their business and operations, was immediate and profound.

Being convinced that the order commanded, inhibited and prohibited action not commanded, inhibited or prohibited by the Natural Gas Act, and knowing that violation of the order might subject petitioners to heavy criminal penalties, even though they violated no provision of the Natural Gas Act, petitioners timely filed with the Federal Power Commission their respective applications for a rehearing with respect to Order No. 174-A (R. 375-395, 396-406, 407-429, 430-439; App. B, 141, 162, 172, 190), this being the procedure prescribed for asserting the existence of error in decisions or orders of the Commission.[3] On September 8, 1954, the Commission ordered oral argument on these applications for rehearing, along with those filed by numerous other producers (19 F.R. 5952; R. 117-122; App. A, 97-99). This order also denied

[3] Section 19(a) of the Natural Gas Act, 15 U.S.C. 717r (App. A, 138); Federal Power Commission, Rules of Practice and Procedure, Section 1.34 (App. B, 198).

all requests for a stay of Order No. 174-A. Following oral argument, the Commission, on September 24, 1954, modified Order No. 174-A so as to make one minor clarification and to postpone the filing date prescribed therein from October 1, 1954, to December 1, 1954 (19 F.R. 6301; R. 370-372; App. A, 100-101).

In November 1954, the Commission having allowed more than thirty days to elapse without acting on their applications for rehearing, petitioners treated such applications as having been denied[4] and instituted the present proceedings under Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b), (App. A, 138-139), by separately filing with the court of appeals for the Fifth Circuit their petitions for review of Order No. 174-A (R. 1, 576, 607, 690; App. B, 199, 214, 224, 235). Petitioners Magnolia Petroleum Company, The Superior Oil Company and Wesley West also invoked the provisions of Section 10 of the Administrative Procedure Act, 5 U.S.C. 1009. In connection with the filing of their petitions, petitioners Magnolia Petroleum Company and The Ohio Oil Company obtained from the court of appeals orders staying Order No. 174-A pending final hearing of their petitions for review (R. 77, 594, App. A, 128, 129). Thereafter, on December 17, 1954, the Federal Power Commission issued its Order No. 174-B, revising in certain respects the procedure prescribed in Order No. 174-A (19 F.R. 8807; R. 447-479; App. A, 102-127). In Order No.

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[4] Both Section 19(a) of the Natural Gas Act, 15 U.S.C. 717r(a) (App. A, 138), and Section 1.34(c) of the Commission's rules of Practice and Procedure (App. B, 198) provide:

> Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application shall be deemed to have been denied.

174-B, the Commission formally denied all applications for rehearing of Order No. 174-A, including those filed by petitioners.

In their petitions for review filed with the court of appeals, and in their applications for rehearing filed with the Commission, petitioners challenged the validity of Order No. 174-A on numerous grounds, many of which had been brought to the attention of the Commission by Commissioner Digby in his forceful dissent to the order (R. 115-116; App. A, 91-96). The grounds urged by petitioners are ably presented and discussed by Circuit Judge Brown in his dissenting opinion (R. 503-544; App. A, 16-50) and footnoted in the majority opinion of the court of appeals (R. 494-495; App. A, 8-9).

The four proceedings instituted by these petitioners were heard and considered by the court of appeals on a single record (R. 86-87; App. A, 130). On June 30, 1956, the court, in a two-to-one decision, dismissed each of the petitions for review filed by these petitioners (R. 485, 545, 595, 682, 771; App. A, 1, 51, 52). Despite its careful analysis of the serious, substantive contentions urged by petitioners as to the invalidity of the order (R. 494-495; App. A, 8-9), the majority opinion of the court of appeals is rested on the sole ground that Order No. 174-A is not a reviewable "order" within the purview of Section 19(b) of the Natural Gas Act, because it was not an order entered upon hearing and findings after completion of the administrative process but, on the contrary, was no more than a promulgation of regulations of general applicability, not self-executory and not commanding these petitioners to do or to refrain from doing anything (R. 485, 496-498; App. A, 1, 10-12). The majority

opinion disregarded the other procedural and substantive issues raised by petitioners. In an able and articulate dissenting opinion, Circuit Judge Brown strongly disagreed and pointed out the many errors in the majority opinion which pinpoint the need for review on writ of certiorari (R. 503-544; App. A, 16-50).

On August 21, 1956, petitions for rehearing filed by each of these petitioners were denied by the court of appeals (R. 574, 605, 688, 778; App. A, 53-54). By orders issued the same date, the certification of the opinion and judgments of the court of appeals was stayed until final disposition of the matter by this Court, conditioned upon proof of timely application for review by this Court on writ of certiorari (R. 575, 606, 689, 779; App. A, 55-58).

REASONS FOR GRANTING THE WRIT

I.

Order No. 174-A Is a Reviewable Order

The majority of the court of appeals made no attempt to determine the validity or invalidity of Order No. 174-A. It held instead that the order is not a reviewable "order", on the sole ground that it is not a definitive order dealing with the merits of a proceeding before the Commission and resulting from a hearing and findings of facts (R. 496-497; App. A, 10-11).[5] The majority concluded that, on the contrary,

[5] The court of appeals did not pass upon the first two of the three contentions advanced by counsel for the Commission, namely, that petitioners (1) have not exhausted their administrative remedies and (2) are not "aggrieved" by the order (see R. 496; App. A, 10). Consequently, those issues are not present in this request for supervisory action by this Court, and the Commission's con-

the order constituted merely "regulations of general applicability", that it "does not change petitioners' existing or future status", that it "is not self-executory and it does not command these petitioners to do or refrain from doing anything" (R. 497-498; App. A, 11).

We shall show in Point II, *infra.*, pp. 16-21, that Order No. 174-A is in fact a definitive order which directly and immediately affects the substantive rights of these petitioners. At the outset, however, it is to be noted, with emphasis, that the conclusion of the majority of the court of appeals as to the nonreviewability of Order No. 174-A is directly in conflict with three recent and unequivocal pronouncements by this Court: *Columbia Broadcasting System* v. *United States,* 316 U.S. 407; *Frozen Food Exp.* v. *United States,* 351 U.S. 40; and *United States* v. *Storer Broadcasting Co.,* 351 U.S. 192.

In *Columbia Broadcasting System* v. *United States,* this Court held reviewable the Federal Communications Commission's chain broadcasting regulations which provided for the refusal of licenses to broadcasting stations having certain types of exclusive-service contracts with a network organization. In *United States* v. *Storer Broadcasting Co.,* jurisdiction was upheld for the judicial review of an order amending the general Rules of the Commission so as to restrict the number of broadcasting stations in which a licensee may have a direct or indirect interest. *Frozen Food Exp.* v. *United States,* held that judicial review should

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tentions as to prematurity and lack of aggrievement, if renewed by the Commission in opposition to this petition, would not be relevant. The basic question here presented is the reviewability of Order No. 174-A.

have been exercised to test an order of the Interstate Commerce Commission declaring certain specified commodities not to be "agricultural commodities" within the meaning of the statutory provision exempting carriers of such commodities from certificate requirements.

In each of these three recent cases, the administrative order under attack was one of general application, not directed to any individual party. In each instance, the statutory authorization for judicial review applied only to "final orders" or "final agency action" (see 5 U.S.C. 1009 and 1034; 47 U.S.C. 402(a)). In each case, there was no conventional administrative proceeding, with a hearing, evidence and findings of facts.[6] Each of the respective parties seeking judicial review did so as a member of the particular industry, or of a segment thereof, whose activities or business relations were affected by the general agency order.[7]

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[6] In the *Columbia Broadcasting* case the regulations were issued following an investigation by a committee of the Commission in which, at the request of the committee, Columbia and other networks intervened and presented briefs and oral arguments. 316 U.S. at 409. In the *Storer Broadcasting* case the only prior action consisted of the Commission's issuance of a notice of rulemaking which, under the Administrative Procedure Act (5 U.S.C. 1003(b)), permitted "interested" parties to file statements or briefs. Storer and other broadcasters filed their objections in this manner, but the Commission thereafter issued its order adopting the proposed regulations without significant change. 351 U.S. at 193-194. In the *Frozen Food* case, the Commission instituted an investigation on its own motion and a public hearing was held by an examiner, where various public agencies, shippers and carriers appeared, following which the Commission issued its report and order. 351 U.S. at 41-42.

[7] In the *Frozen Food* case, Frozen Food Express was not even a party to the administrative investigation. See 351 U.S. at 42.

Notwithstanding the general character of each of the orders challenged in the *Columbia Broadcasting, Storer Broadcasting* and *Frozen Food* cases, this Court held, in each instance, that the order in question was subject to judicial review without further proceedings. In so holding, this Court emphasized the "immediate and practical impact" of the orders on those coming within the terms thereof (351 U.S. at 44), because the orders operated to "presently determine rights" (316 U.S. at 421) and "to control the business affairs" and contractual relations of the members of the affected industry (351 U.S. at 199; 316 U.S. at 422). Such orders, it was held, constitute "final agency action" within the meaning of the statutory authorization for judicial review. See 351 U.S. at 198. See also *Amshoff* v. *United States*, 228 F. 2d 261, 265 (C.A. 7, 1955), cert. den. 351 U.S. 939.

It was also found in the three cases mentioned that the petitioning network, broadcasting and trucking companies had present standing to seek judicial review. As persons whose contractual rights were immediately affected by the provisions of the orders, and who might, upon failure to comply with the orders, be subjected to economic injury or criminal penalties (see 316 U.S. at 417; 351 U.S. at 44; 351 U.S. at 198), the companies were "parties aggrieved" by the orders. 351 U.S. at 198. The fact that the orders were not specifically directed to the companies seeking review was held to be immaterial. As was said in the *Columbia Broadcasting* case (316 U.S. at 422):

> Appellant's standing to maintain the present suit in equity is unaffected by the fact that the regulations are not directed to appellant and do not in terms compel action by it or impose penal-

> ties upon it because of its action or failure to act. It is enough that, by setting the controlling standards for the Commission's action, the regulations purport to operate to alter and affect adversely appellant's contractual rights and business relations with station owners whose applications for licenses the regulations will cause to be rejected and whose licenses the regulations may cause to be revoked.

There is no material difference between the situation involved in the present case and those before this Court in the *Columbia Broadcasting*, *Storer* and *Frozen Food* cases. Here, as in those cases, an administrative agency has undertaken to interpret—erroneously, we believe—its basic statute and has promulgated that interpretation in the form of a general order applicable to *all* independent producers of natural gas, a class to which these petitioners belong. The order *inter alia* presently commands petitioners to file rate schedules (freezing those rates as of June 7, 1954), to apply for certificates of public convenience and necessity, and to continue sales until Commission approval for abandonment is obtained. See pp. 4-5, *supra*. It thus has an "immediate impact" on petitioners' contractual relationships and the conduct of their business affairs.[8] Moreover, a violation of the order will subject petitioners to heavy criminal penalties under Section 21(b) of the Natural Gas Act (15 U.S.C. 717t(b); App. A, 140), the consequences of which "are not conjectural." See 351 U.S. at 44. These petitioners occupy the same

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[8] As noted by the dissenting judge (R. 527-528; App. A, 35-36) and as alleged by petitioners (see R. 11-12; App. B, 207), the interstate pipeline companies refused to make payments or honor the terms of their contracts unless these petitioners immediately complied with Order No. 174-A.

position as that held by the network, broadcasting and trucking companies concerned in the three cases discussed. Petitioners, like those companies, are entitled to the judicial review here sought.

The court of appeals, in its majority opinion, makes no mention whatever of the *Storer Broadcasting* and *Frozen Food* cases, notwithstanding the able discussion of those cases in the dissenting opinion of Circuit Judge Brown (R. 508-514; App. A, 19-24). The majority opinion does, however, devote some three pages to an effort to distinguish the *Columbia Broadcasting* case, on the ground that the review there sought was in an equity proceeding brought in a district court under Sec. 402(a) of the Federal Communications Act, rather than by an appeal to the court of appeals under Sec. 402(b) (R. 498-501; App. A, 12-14). This attempted distinction is without basis and reveals a complete misconception of the interrelation of the two methods of review provided by the Communications Act. As this Court has been careful to point out, there is no difference between the types of review available under Sec. 402(a) and Sec. 402(b), the "two roads to judicial review" being merely "the product of Congressional solicitude for the convenience of litigants." *Scripps-Howard Radio* v. *Federal Communications Commission,* 316 U.S. 4, 15-16. This is also clear from the *Storer Broadcasting* case, where the review was under Sec. 402(b) and not Sec. 402(a), as was pointed out by Circuit Judge Brown in his footnote 6 (R. 513; App. A, 23). The view of the majority cannot be correct, since, if the judgments below are allowed to stand, Order No. 174-A will never be subject to judicial review. See *Federal Power Commission* v. *Union Producing Company,* 97 U.S. App. D.C. 223, 230 F. 2d 36 (C.A.D.C. 1956), cert. den. 351 U.S. 927; and see

dissent of Circuit Judge Brown, footnote 1 (R. 508-509; App. A, 19).

The majority of the court of appeals relies chiefly on *Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U.S. 375, to conclude that Order No. 174-A is not a reviewable "order" because it is not an order "dealing with the merits of a proceeding before the Commission and resulting from a hearing upon evidence and supported by findings appropriate to the case." (R. 496-498; App. A, 10-12). The *Metropolitan Edison* case applies to circumstances wholly distinguishable from the present situation, because there the petition filed with the court of appeals merely sought a rule to show cause why the Commission should not be restrained from proceeding with an inquiry involving the petitioner pending disposition of a petition for rehearing. See 304 U.S. at 379. As this Court appropriately noted, "There was no order of the Commission before the Circuit Court of Appeals for review" and "no application for such a review had been made." 304 U.S. at 381. Moreover, a factual record and findings are not prerequisites to review of an administrative order where the questions presented are legal in character. See *Ashbacker Radio Co.* v. *Federal Communications Commission*, 326 U.S. 327, 330-331; *Atlantic Seaboard Corp.* v. *Federal Power Com'n*, 201 F. 2d 568, 572-573 (C.A. 4, 1953); *American Broadcasting Co.* v. *Federal Communications Com'n*, 89 U.S. App. D.C. 298, 306-307; 191 F. 2d 492, 501-502 (C.A.D.C., 1951). In any event, as was forcefully stated by the dissenting judge (R. 514, fn. 6; App. A, 24), the absence of a hearing, evidence and findings, which is the very basis of the attack, cannot, by a bootstrap-lifting process, be turned into a deficiency

making an order nonreviewable. It is also immaterial that the question might be raised in subsequent proceedings brought to enforce the order. *Rochester Tel. Corp.* v. *United States,* 307 U.S. 125, 132; *Varney* v. *Warehime,* 147 F. 2d 238, 243 (C.A. 6, 1945), cert. den. 325 U.S. 882. See also *Columbia Broadcasting System* v. *United States,* 316 U.S. 407, 423. As was there said (316 U.S. at 425):

> The ultimate test of reviewability is not to be found in an overrefined technique, but in the need of the review to protect from the irreparable injury threatened in the exceptional case by administrative rulings which attach legal consequences to action taken in advance of other hearings and adjudications that may follow, the results of which the regulations purport to control.

The circumstances of the present case meet all of the tests of reviewability prescribed by this Court in the *Columbia Broadcasting, Storer Broadcasting* and *Frozen Food* cases. The decision of the court of appeals is totally in conflict with those authoritative rulings by this Court.

II.

Order No. 174-A Constitutes a Definitive and Illegal Invasion of Petitioners' Substantive Rights

As has been stated, *supra,* p. 8, the validity or invalidity of Order No. 174-A was not determined by the court of appeals but the petitions of these petitioners were dismissed for lack of jurisdiction on the ground that the order is not a definitive order. As is clearly shown by Circuit Judge Brown in his dissenting opinion (R. 514-536; App. A, 24-43), such order was definitive in character, affected the substantive rights of these petitioners, was self-executing and had

an immediate impact upon these petitioners. The dissenting judge, after discussing and emphasizing the substantive character and specific impact of the order, concludes as follows (R. 536; App. A, 43):

> These and many other specific impacts result from the Order, but those discussed sufficiently illustrate the practical consequences and the ripeness now for judicial review. Serious questions of law call for an immediate determination by constitutional courts. Neither orderly administration nor due regard to the separation of executive and judicial functions compels or suggests that review should be postponed.

The definitive character of Order No. 174-A is clearly demonstrated by the language employed in the order. Of particular significance is its mandatory and imperative terminology. The word "shall" is repeated throughout the order. For example (R. 112-114; App. A, 79-89): "Every independent producer . . . *shall* . . . file with the Commission rate schedules . . ." (Sec. 154.92(a)). "No change *shall* be made in any rate." (Sec. 154.94(a)). "Every change in a rate schedule . . . *shall* be filed with the Commission." (Sec. 154.94(b)). "The operation of any provision of the rate schedule providing for future or periodic changes in the rate . . . *shall* constitute a change in rate schedule." (Sec. 154.94(c)). "With each change in rate schedule there *shall* be submitted reasons." (Sec. 154.94(e)). "If any rate schedule . . . is not in writing, its terms *shall* be reduced to writing." (Sec. 154.95). "Every independent producer . . . *shall* . . . file with the Commission an application . . ." [for a certificate, and pending] "action by the Commission on an application hereunder, the service for which authorization is sought *shall* be continued." (Sec. 157.23(a)). "No

independent producer of natural gas *shall* . . . engage in any new service . . . without approval of the Commission, evidenced by a certificate of public convenience and necessity . . ." (Sec. 157.23(b)). "No independent producer . . . *shall* abandon any sale . . . without the express permission and approval of the Commission . . ." (Sec. 157.28).

It is thus seen that the majority opinion of the court of appeals is totally in error in its conclusion that Order No. 174-A "does not change the petitioners' existing or future status" and "does not command these petitioners to do or refrain from doing anything." (R. 497-498; App. A, 11). Precisely the opposite is true. The order is a definitive command to all independent producers, including these petitioners, to perform certain acts, as is forcefully demonstrated in the dissent of Judge Brown (R. 514-536; App. A, 24-43).

It is also clear that the requirements of Order No. 174-A constituted a direct and unlawful invasion of petitioners' substantive rights under the Constitution and under the Natural Gas Act. For example, Sec. 154.94, as promulgated in the order, would retroactively freeze the rates which petitioner may charge for gas at those prevailing on June 7, 1954, although petitioners may and do have previously executed sales contracts providing for periodic price increases subsequent to that date. This is in contravention of Section 5(a) of the Natural Gas Act (15 U.S.C. 717d(a), App. A, 134), which merely authorizes the Commission to determine rates "to be *thereafter* observed and in force." *Federal Power Commission* v. *Hope Gas Co.*, 320 U.S. 591, 618. See also *Montana-Dakota Co.* v. *Public Serv. Co.*, 341 U.S. 246, 251.

Section 154.94 also provides that such periodic price increases shall constitute new rates for which new rate schedules must be filed under Section 4(c) of the Act (15 U.S.C. 717c; App. A, 132) which, when filed, would be subject, under Section 4(e) of the Act (App. A, 133-134), to the Commission's power to suspend the effective date of the increase for a period of five months and thereafter to require the furnishing of a bond pending a determination by the Commission of the lawfulness of the higher rate. In this respect, the order would directly affect petitioners' contractual rights. The provisions for periodic price increases are a part of the producers' original sales contracts and the Commission has no power, under Sec. 4 of the Act, to disregard rate provisions embodied in a basic contract. This is made clear by the recent decision of this Court in *United Gas Co.* v. *Mobile Gas Corp.*, 350 U.S. 332. See also *Federal Power Commission* v. *Sierra Pacific Power Co.*, 350 U.S. 348. As was specifically noted in the *Mobile* case (350 U.S. at 338-339):

> In construing the Act, we should bear in mind that it evinces no purpose to abrogate private rate contracts as such. To the contrary, by requiring contracts to be filed with the Commission, the Act expressly recognizes that rates to particular customers may be set by individual contracts. * * * Recognizing the need these circumstances create for individualized arrangements between natural gas companies and distributors, the Natural Gas Act permits the relations between the parties to be established initially by contract, the protection of the public interest being afforded by supervision of the individual contracts, which to that end must be filed with the Commission and made public.

Under the Act, if the Commission believes that a rate under a contract is too high, it may proceed to reduce the rate, after notice and hearing, under Section 5. But it cannot nullify the provisions of the contract, without notice or hearing, as it attempted to do in Order No. 174-A, by the device of defining increases under the contract as changes in rates and thus requiring the filing of new rate schedules, the operation of which it would subject to its suspension powers. It is Order No. 174-A which defines an increase under a contract as a change in the rates, and not the Natural Gas Act, and in the absence of such order these petitioners would have been entitled to collect all periodic increases under their contracts until such time as the Commission might find, in a Section 5 proceeding, that the rates were too high.

The order also violates petitioners' rights under Section 7 of the Natural Gas Act (15 U.S.C. 717f; App. A, 134-138) in that it commands petitioners to apply for certificates of public convenience and necessity (Sec. 157.23), commands independent producers to continue sales and deliveries being made on June 7, 1954, and prohibits the abandonment thereof except with Commission approval (Sec. 157.28), although a producer may prefer to withdraw from the business. Section 7 of the Act contains no such mandatory provisions. Section 7(c) of the Act merely provides that sales covered by the Act may not be commenced or continued unless a certificate has first been obtained. In other words, under the Act, the acquisition of a certificate or the continuance of previously made sales is entirely optional. In like manner, Section 7(b) of the Act, which relates to abandonment, applies only to facilities subject to the jurisdiction of the Commis-

sion and the service rendered by such facilities. All of the facilities operated by petitioners are production and gathering facilities, which are not subject to the jurisdiction of the Commission, being specifically exempted by Section 1(b) of the Act (15 U.S.C. 717(b), App. A, 131).[9] *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 508.

Another respect in which Order No. 174-A encroaches upon petitioners' contractual rights, in violation of the statute, is found in the provision requiring that all rate schedules not in writing shall be reduced to writing (Sec. 154.95). This would deprive petitioners of the right to sell their gas on a day to day basis, if they should so desire, under oral contracts or under *ex parte* tariff schedules. There is nothing in the Natural Gas Act which prohibits the sale of gas under oral agreements or *ex parte* tariff schedules. Only the order would forbid such arrangements.

It is thus clear that Order No. 174-A is an attempt by the Federal Power Commission to extend its powers and jurisdiction far beyond those vested in the Commission by the Natural Gas Act. In commanding these petitioners to do and not to do things not required or prohibited by the Act, the order constitutes a direct invasion of petitioners' substantive rights. This ines-

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[9] This exemption was not affected by the *Phillips* decision. As has been shown *supra*, fn. 2, p. 3, the question there was a narrow one, being limited to jurisdiction over "*rates* charged" by a producer and gatherer in an interstate sale for resale. 347 U.S. at 674. There is nothing in the *Phillips* case which holds that other provisions of the Natural Gas Act, such as those of Section 7 relating to certificates of public convenience and necessity and to the abandonment of facilities or service, can be considered applicable to producers and gatherers without transgressing the exemption provision of Section 1(b).

capable fact is emphasized in the impressive dissenting opinion of Judge Brown (R. 514-536; App. A, 24-43).

It may also be mentioned that Order No. 174-A infringes upon rights and powers reserved to the States under the Constitution and by the Natural Gas Act. The command to continue selling the volumes of gas being sold on June 7, 1954, and to abandon such sales only with Commission approval (Sec. 157.28), is in effect a command to continue production at the levels prevailing on June 7, 1954. But the production of natural gas and the rate of such production are matters under the exclusive control of the States and their conservation agencies. *Interstate Natural Gas Co.* v. *Federal Power Commission,* 331 U.S. 682, 690. See also *Federal Power Commission* v. *Hope Gas Co.,* 320 U.S. 591, 612; *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.,* 337 U.S. 498, 508.

The foregoing summary of the manner in which Order No. 174-A exceeds the statutory authority of the Commission and directly invades the substantive rights of these petitioners takes on particular significance when it is remembered that the court of appeals dismissed the several petitions for review for want of jurisdiction. In each of the petitions for review the relevant facts as to the nature of the order and its infringement upon petitioners' rights were fully alleged (R. 1-15, 576-592, 607-619, 690-706; App. A, 199-210; 214-223, 224-234, 235-245). These allegations must be accepted as true in determining the jurisdiction of the court. *Columbia Broadcasting System* v. *United States,* 316 U.S. 407, 414; *American Sumatra T. Corp.* v. *Securities and Exch. Com'n,* 68 App. D.C. 77, 80; 93 F. 2d 236, 239 (C.A.D.C., 1937); *Philadelphia Co.* v. *Securities & Exchange Commission,* 82 U.S. App.

D.C. 335, 336; 164 F. 2d 889, 890 (C.A.D.C., 1947), cert. den. 333 U.S. 828. Indeed, they were not controverted. They are, in themselves, sufficient to require the court of appeals to exercise its powers of judicial review. As was concluded in the *Frozen Food* case, "the issues raised in the complaint are justiciable" and the court "should adjudicate the merits." 351 U.S. at 45. See also *Columbia Broadcasting System* v. *United States,* 316 U.S. at 423; *United States* v. *Storer Broadcasting Co.,* 351 U.S. at 196-198.

CONCLUSION

The Federal Power Commission has issued an order which directly aggrieves these petitioners and adversely affects their substantive rights. The refusal of the court of appeals to review that order is an error which this Court should correct. In any event, the decision of the court of appeals is so openly in conflict with the recent decisions of this Court in the *Columbia Broadcasting, Storer Broadcasting* and *Frozen Food* cases that this Court may well see fit to grant the certiorari here sought and reverse the decision below in a single order, with instructions to determine the validity *vel non* of the order.

For all the reasons hereinabove given, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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